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No. _____

In The

Supreme Court of the United States

October Term, 1993

PATRICIA ECHARTE, a minor, by and through her parents and natural guardians, NORMA ECHARTE and PEDRO ECHARTE, and NORMA ECHARTE and PEDRO ECHARTE, individually,

Petitioners,

v.

UNIVERSITY OF MIAMI, d/b/a THE UNIVERSITY OF MIAMI SCHOOL OF MEDICINE, a Florida corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

JOEL D. EATON, ESQ.
(Counsel of Record)
JOEL S. PERWIN, ESQ.

PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A.
25 W. Flagler Street, Suite 800
Miami, Fla. 33130
(305) 358-2800

Attorneys for Petitioners

GROSSMAN & ROTH, P.A.
Grand Bay Plaza, PH-1
2665 South Bayshore Drive
Miami, Fla. 33133

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Does a statutory scheme which automatically "caps" a medical malpractice victim's recovery of (1) economic damages for past lost earnings and future loss of earning capacity at 80% of the actual loss and (2) intangible damages at arbitrary amounts of $250,000.00 or $350,000.00, at the unilateral election of a tortfeasor who simply chooses to admit liability rather than contest it, violate the "taking without just compensation" guarantee of the Fifth Amendment to the United States Constitution?

2. Does a statutory scheme which automatically "caps" a medical malpractice victim's recovery of (1) economic damages for past lost earnings and future loss of earning capacity at 80% of the actual loss and (2) intangible damages at arbitrary amounts of $250,000.00 or $350,000.00, at the unilateral election of a tortfeasor who simply chooses to admit liability rather than contest it, violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution?

3. Does a statutory scheme which automatically "caps" a medical malpractice victim's recovery of (1) economic damages for past lost earnings and future loss of earning capacity at 80% of the actual loss and (2) intangible damages at arbitrary amounts of $250,000.00 or $350,000.00, at the unilateral election of a tortfeasor who simply chooses to admit liability rather than contest it, violate the substantive and procedural due process guarantees of the Fourteenth Amendment to the United States Constitution?

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The petitioners, Patricia Echarte, a minor, by and through her parents and natural guardians, Norma Echarte and Pedro Echarte, and Norma Echarte and Pedro Echarte, individually, respectfully pray that a writ of certiorari issue to review the decision and judgment of the Supreme Court of Florida entered in this proceeding on May 13, 1993.

OPINIONS BELOW

The decision of the Supreme Court of Florida, which consists of a majority opinion and two dissenting opinions, is reported at 618 So.2d 189, and appears in the separate appendix at pages 1-32. The decision of the District Court of Appeal of Florida, Third District, is reported at 585 So.2d 293, and appears in the appendix at pages 33-54. The trial court's "Summary Final Judgment Declaring §§ 766.207 and 766.209, Fla. Stat. (1988 Supp.), Unconstitutional" is reported at 40 Fla. Supp.2d 193, 15 Fla. Law Weekly C15, and appears in the appendix at pages 55-61.

JURISDICTION

The decision and judgment of the Supreme Court of Florida was entered on May 13, 1993. No motion for rehearing was filed. This petition for writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution (emphasis supplied):

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put ~~in~~ jeopardy of life or limb; nor shall ~~be~~ compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*

Fourteenth Amendment, Section 1, U ted States Constitution (emphasis supplied):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

The Florida Statutes whose constitutionality is in issue here are §§ 766.207 and 766.209, Fla. Stat. (1988 Supp.). Because they are fairly lengthy, we will not set them out here. They are quoted in full in the appendix, in

the decision of the District Court of Appeal, at pages 34-39.

STATEMENT OF THE CASE

In 1986, at the vocal insistence of powerful medical and insurance industry lobbies, the Florida legislature imposed an absolute $450,000.00 "cap" on the recovery of intangible damages by all Florida tort victims. Ch. 86-160, § 59, Laws of Florida. Within a year, by a vote of 5 to 2, the Florida Supreme Court declared this "cap" to be wholly arbitrary, and in violation of Florida's constitutional right of access to the courts and right to trial by jury. *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987). The lobbies responded with a well-funded petition drive to place a constitutional amendment on the ballot which, had it passed, would have imposed a $100,000.00 "cap" on the recovery of intangible damages by all tort victims. The proposed amendment was roundly and soundly defeated by Florida's voters.

The lobbies had more success with the Florida legislature, which responded to the *Smith* decision with more selective, but no less draconian damage "caps," directing them at medical malpractice victims alone. Sections 766.207 and 766.209, Fla. Stat. (1988 Supp.). When the constitutionality of those statutes ultimately reached the Florida Supreme Court, the composition of the Court had changed. Two justices who had not participated in the earlier decision in *Smith* joined the two justices who had dissented there, to produce a 4 to 2 majority (one justice

recused) upholding the statutes against numerous constitutional challenges (App. pp. 1-32).[1] It is that decision which we ask this Court to review. Its factual and procedural background follows.

The "Findings of Fact" which the trial court made below adequately sketch both the facts and the problem:

> The plaintiff, Patricia Echarte, is a minor, and is represented here by her parents and natural guardians, Norma Echarte and Pedro Echarte. Mr. and Mrs. Echarte are also plaintiffs, in their individual capacities. On January 10, 1989, Patricia Echarte [who was then less than a year old] was admitted to Jackson Memorial Hospital as a patient of agents of the defendant, for surgery unrelated to the incident in suit. The surgery was performed by agents of the defendant on January 11, 1989. As a result of various negligent acts and omissions committed by agents of the defendant during the surgery and the hospitalization which followed, Patricia Echarte's right arm was injured, and it had to be amputated below the elbow on February 8, 1989, to save her life.
>
> On June 22, 1989, the plaintiffs delivered a Notice of Intent to Initiate Litigation letter upon the defendant, as required by § 766.106, Fla. Stat. (1988 Supp.). All other conditions precedent to perfecting the plaintiffs' potential claims for medical malpractice against the defendant were also performed. On July 12, 1989, the

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[1] The justice who was recused had joined the earlier majority in *Smith v. Department of Insurance*, 507 So.2d 1080 (Fla. 1987), so, but for the recusal, the vote would most likely have been 4 to 3.

> defendant responded in writing to the plaintiffs' notice of intent letter. The response requests that the plaintiffs accept voluntary arbitration of their claims, pursuant to § 766.207, Fla. Stat. (1988 Supp.). The defendant's response amounts to an admission of liability, coupled with a request that the plaintiffs' damages be determined by arbitration rather than jury trial, but subject to the various damage "caps" set forth in § 766.207.
>
> If the plaintiffs accept the defendant's request, liability will be deemed admitted, but the plaintiffs' damages will be limited to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's loss of earning capacity; (3) a percentage of no more than $250,000.00, to be determined by the arbitrators based upon Patricia's percentage loss of the capacity to enjoy life, for the various items of the plaintiffs' non-economic damages otherwise recognized by law; and (4) various costs and limited attorney's fees. If the plaintiffs reject the defendant's request, they will be required to litigate the issue of the defendant's liability, and their damages will be limited by § 766.209, Fla. Stat. (1988 Supp.), to the recovery of (1) past and future medical expenses; (2) 80% of Patricia's loss of earning capacity; and (3) non-economic damages not to exceed $350,000.00. Given her tender age and the nature of her injury, Patricia Echarte's actual damages far exceed those limited amounts. The plaintiffs are legitimately in doubt as to their legal rights.

(App. pp. 56-57).[2]

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[2] The non-economic damages "capped" by the defendant's admission of liability are elsewhere defined in § 766.202(7), Fla. Stat. (1988 Supp.), as "nonfinancial losses which would not have occurred but for the injury giving rise to the cause of action,

It was to resolve these doubts that the Echartes filed a Complaint for Declaratory Judgment against the respondent here, University of Miami, d/b/a the University of Miami School of Medicine (App. pp. 62-67). The complaint alleged that §§ 766.207 and 766.209 violated various provisions of the Florida Constitution and the United States Constitution, including the Fifth and Fourteenth Amendments to the latter constitution; it prayed for a judgment declaring the two statutes unconstitutional, and for a declaration that the plaintiffs were entitled to a jury trial of their claims against the defendant at which they could recover the total amount of their actual damages, as the statutes allowed other medical malpractice victims to do. The plaintiffs ultimately moved for a summary judgment in their favor; in the memorandum of law filed in support of their motion, the plaintiffs explicitly raised and argued each of the three questions we have presented for review here.[3]

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including pain and suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of capacity for enjoyment of life, and other nonfinancial losses." We take it to be obvious that the loss of an arm before a first birthday causes damages of this kind well in excess of $350,000.00.

[3] Because the trial court's declaratory judgment expressly ruled in the plaintiffs' favor on the second and third questions presented for review here (App. pp. 59-60), and because the Florida Supreme Court's decision expressly rejects our position on those questions (App. pp. 2-3), there should be no need for us to be particularly specific about how those two questions were raised below in the lower courts. None of the lower courts expressly disposed of the first question presented for review here, however, so we have included in the appendix our arguments on that issue, which were consistently made at every stage of the proceedings. The argument was made to the trial

The trial court granted the plaintiffs' motion for summary judgment and entered a final judgment declaring that the statutes violated several provisions of the Florida Constitution and the Fourteenth Amendment to the United States Constitution:

> By "capping" the plaintiffs' damage recovery in specific amounts, the challenged statutes create two classifications of medical malpractice victims – those with insignificant injuries who are compensated in full, and those with serious injuries who are deprived of full compensation. This classification is entirely arbitrary and contrary to the fundamental notion of equal justice under the law. [Citation omitted]. It is also impossible that singling out the most seriously injured medical malpractice victims, rather than imposing the same burden equally upon all such victims, bears any *rational* relationship to the avowed purpose of the statutes. [Citation omitted]. The challenged statutes therefore violate the equal protection guarantees of both the Florida Constitution and the United States Constitution.
>
> To cap a plaintiff's damages at a specified numerically-defined amount without regard to the actual damages caused by a defendant's malpractice is, by definition, to draw an entirely

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court at pages 26-27 of the memorandum filed in support of our motion for summary judgment (App. pp. 68-69). The argument was made to the District Court of Appeal at p. 33 of our Brief of Appellees (App. p. 70). And the argument was made to the Supreme Court at page 37 of our Brief of Appellees (App. p. 70). These arguments were more than sufficient to preserve the question for review here. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n. 5 (1980).

> arbitrary line between recovery and non-recovery. [Citation omitted]. In addition, a statutory scheme which allows insignificantly injured medical malpractice victims to recover the full amount of their damages, but which deprives seriously injured victims of a full recovery (with the extent of that deprivation *increasing* as the extent of injury increases) is both unreasonable and oppressive. [Citation omitted]. The challenged statutes therefore violate the procedural and substantive due process guarantees of both the Florida Constitution and the United States Constitution.

(App. pp. 59-60).

The trial court also declared the statutes violative of Florida's "takings" clause, which is indistinguishable from the "takings" clause in the Fifth Amendment to the United States Constitution, as follows:

> The challenged statutes recognize that the plaintiffs have a vested property right in a recovery of their actual damages, because they authorize recovery of the full measure of damages if the defendant had not elected to request arbitration. Yet the statutes delegate to the defendant the unilateral right to deprive the plaintiffs of a portion of that property and retain that portion for its own benefit, without providing any mechanism for compensating the plaintiffs for that "taking". Article X, § 6(a) of the Florida Constitution provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . " The challenged statutes clearly violate the plain language of this provision of the Florida Constitution. [Citation omitted].

(App. pp. 58-59). Unfortunately, the trial court did not expressly rule on our similar claim under the Fifth Amendment.

The University of Miami thereafter appealed the judgment to the District Court of Appeal of Florida, Third District. Once again, the plaintiffs explicitly raised and argued each of the three questions we have presented for review here. Because the trial court had not expressly ruled on our federal "takings" clause argument, we raised the argument again, as we were entitled to do, under Florida's familiar "right for the wrong reason" rule (App. p. 70). *See Landis v. Allstate Insurance Co.*, 546 So.2d 1051 (Fla. 1989). A three-judge panel of the District Court of Appeal unanimously affirmed the trial court's declaratory judgment (App. pp. 33-54). It rested its determination of the unconstitutionality of the two statutes on a single ground – their violation of Florida's "access to courts" guarantee – and expressly declined to review the remaining grounds in the trial court's judgment as unnecessary to its affirmance (App. p. 40).

The University of Miami thereafter appealed this decision to the Florida Supreme Court. Once again, the plaintiffs explicitly raised and argued each of the three questions we have presented for review here. Because the District Court of Appeal had not expressly ruled on any of our federal constitutional arguments, we raised the arguments again under the "right for the wrong reason" rule (App. p. 70). By a vote of 4 to 2 (one justice recused), the Supreme Court of Florida reversed the District Court's determination that the statutes violated Florida's "access to courts" guarantee (App. pp. 1-33).

The majority also expressly rejected the remaining grounds upon which the trial court had declared the statutes unconstitutional, with a cursory shrug of its pen, as follows:

> . . . [W]e limit our discussion to the validity of the statutes under the right of access to the courts. However, we have also considered the other constitutional claims and hold that the statutes do not violate the right to trial by jury, equal protection guarantees, substantive or procedural due process rights, the single subject requirement, the taking clause, or the non-delegation doctrine.

(App. p. 3).

Both of the dissenting justices disagreed vigorously with the majority's conclusion that the statutes passed muster under Florida's "access to courts" guarantee. Both dissenting justices also opined that the statutes violated the equal protection guarantee of the Fourteenth Amendment to the United States Constitution (App. pp. 21-23, 31). Both dissenting justices also opined that the statutes violated the "taking" clause of the Fifth Amendment to the United States Constitution: "A benefit enjoyed by the general public at the expense of a particular claimant is a taking of the claimant's property without compensation, in violation of the state and federal constitutions" (App. p. 31). And both dissenting justices declared that our arguments bottomed upon the substantive and procedural due process guarantees of the Fourteenth Amendment were "persuasive" (App. pp. 30-31). This timely petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The statutory scheme in issue here plainly violates the "no taking without just compensation" guarantee of the Fifth Amendment, as interpreted and applied by decisions of this Court.

While our first contention is unconventional (because the statutes in issue here are unprecedented), the contention is perfectly straightforward. The Fifth Amendment's proscription against the taking of private property for public use without just compensation undeniably applies to the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). It is also settled in this Court that a cause of action for damages, if recognized by state law, creates a "property right" in the injured person which is protected by the Fifth and Fourteenth Amendments. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *See Tulsa Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) (" . . . a cause of action is a species of property protected by the Fourteenth Amendment. . . . "). This Court's constitutional jurisprudence also does not "distinguish among different kinds of property . . . ," and "[a]ny significant taking of property by the State is within the purview . . . " of constitutional protection. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606, 608 (1975).

The purpose of the Fifth Amendment's proscription is also settled: "[t]he Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Webb's Fabulous Pharmacies, supra* at 163, *quoting*

Armstrong v. United States, 364 U.S. 40, 49 (1960). *Accord First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304 (1987). Most respectfully, that is *precisely* what the statutory scheme in issue here does: it forces *only* the most seriously injured victims of medical malpractice to bear *all* of the burdens of the purported public benefit of reducing the cost of malpractice insurance.

The statutes were enacted for the express purpose of providing an incentive to medical malpractice defendants to admit liability, in order to reduce the costs of litigation and to shave a few percentage points (a hypothetically estimated 2.4% to 11%) off the cost of medical malpractice liability insurance – for the purported benefit of the public as a whole (App. pp. 4-6, 53). The Florida legislature did not simply abolish or limit medical malpractice victims' causes of action to that end, however, as this Court's Fifth Amendment jurisprudence might have allowed. *See Logan, supra* at 432 ("While the legislature may elect not to confer a property interest, . . . it may not constitutionally authorize the deprivation of such an interest, once conferred. . . . "). Instead, the statutes in issue here explicitly recognize that medical malpractice victims do have property rights, both in their causes of action and in the *full* amount of their economic and intangible damages, because they initially authorize recovery of the full measure of a medical malpractice victim's damages in all cases, and then simply delegate to negligent defendants the right to avoid paying some of those damages in whatever cases they select by exercising

their unilateral option to admit rather than contest liability.[4]

To be more specific, a plaintiff who has suffered intangible damages in an amount less than the "caps" is entitled to recover 100% of those damages, whether the defendant chooses to admit liability or not. In addition, a plaintiff who has suffered intangible damages in an amount which exceeds the "caps" is also entitled to recover 100% of those damages if the defendant chooses to contest the issue of its liability before a jury. The *only* circumstance in which these pre-existing and statutorily-recognized property rights are curtailed is when a defendant takes advantage of the singular *option* granted him by the statutes to admit liability and demand arbitration when the plaintiffs' property rights exceed the "caps." That statutory option is neither an abolition of a cause of action nor a declaration that the plaintiff has no property rights in the full measure of his damages; it is simply a grant of unilateral authority to medical malpractice defendants to pay less than full compensation to their

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[4] In the argument which follows, we will focus upon the optional "caps" imposed upon intangible damages. We remind the Court here, however, that the statutes contain an additional wrinkle concerning damages for past lost income and future loss of earning capacity. The statutes recognize an initial property interest in the recovery of 100% of those damages, until the point at which the defendant exercises its option. If the defendant chooses to contest liability, the plaintiff may recover the full 100% of each of those items of damage. If the defendant chooses to admit liability by demanding arbitration, 20% of those damages are automatically lopped off. The analysis in the text applies to the uncompensated "taking" represented by this aspect of the statutory scheme as well.

victims if they choose to admit, rather than to contest, liability. And that, we believe, amounts to precisely the type of "taking" prohibited by the Fifth Amendment. *See Logan, supra* at 432 ("While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred. . . . ").

The point can best be made with a simple, parallel hypothetical. Assume that, instead of imposing "caps" on the amounts which a negligent defendant had to *pay* its victim, the statutes required the defendant to pay the victim the full measure of compensation needed to redress the victim's intangible damages, and then required the plaintiff to pay over to the state all sums recovered above $250,000.00 or $350,000.00 (depending upon whether the plaintiff had accepted or rejected a defendant's demand to arbitrate). The statutes might then require the state to place these monies into the general revenue fund for the public benefit, or even to return the monies collected to the defendant (or its insurer) for the putative public benefit of reducing liability insurance rates and increasing the availability of medical care. If that is what the statutes had required, we believe this Court would not have hesitated for an instant to declare such a scheme violative of the Fifth Amendment – because it is *precisely* that type of uncompensated appropriation of private property interests which the Fifth Amendment is designed to prevent.

The statutes presently before the Court are different in form from our hypothetical, of course. In substance, however, they do exactly the same thing – and the difference amounts to little more than a bookkeeping entry.

Instead of the state taking the plaintiff's property and placing it in the general revenue fund or returning it to the defendant (or its insurer) for the public benefit, the statutes in issue simply delegate authority to the defendant to keep the money in the first instance, eliminating the transactions in between. And if our hypothetical statutes would violate the Fifth Amendment, then the statutes in issue here – which amount to little more than a shell game in which exactly the same thing is accomplished, by delegating to the defendant the option to appropriate the plaintiff's property rights without compensation simply by admitting liability – must be held violative of the Fifth Amendment as well. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (where a state is prohibited by the Constitution from doing a particular act, the state may not statutorily delegate authority to a citizen to do that particular act); *Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla.) (same), *aff'd sub nom. Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, 428 U.S. 901 (1976).

Most respectfully, the statutes in issue here plainly confer property rights upon the innocent child who was the victim of the defendant's malpractice in this case – for *all* of her damages, both economic and intangible. They then confer upon the defendant the unilateral option to contest liability and pay *all* of those damages if found negligent by a jury, or to deprive the innocent plaintiff of 20% of her economic loss of earning capacity and all of her intangible damages above $250,000.00 or $350,000.00, simply by admitting liability before suit is filed – all for the putative benefit of the public as a whole. We repeat: "[t]he Fifth Amendment's guarantee . . . was designed to

bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Webb's Fabulous Pharmacies, supra* at 163. The statutes in issue here place all the public burden of reducing the cost of liability insurance solely upon the most seriously injured victims of medical malpractice, at the sole election of their victimizers – and if the Fifth Amendment's proscription against the taking of private property for public use without just compensation does not prohibit such a taking, then we respectfully submit that this constitutional guarantee has been reduced to an empty shell.

2. The statutory scheme in issue here plainly violates the equal protection guarantee of the Fourteenth Amendment, and the Florida Supreme Court's determination of this federal question conflicts with the decisions of several other state courts of last resort.

Quite apart from the uncompensated "taking" of private property interests which the statutes effectively permit, the statutes in issue here also violate the equal protection guarantee of the Fourteenth Amendment – because they are totally arbitrary in the monetary lines they draw between recovery and non-recovery, and wholly irrational in their classifications, as several state courts of last resort have held in ruling on the constitutionality of similar statutes imposing damage "caps." This is not a case like *Martinez v. California*, 444 U.S. 277 (1980), in which a legislature has simply abolished a cause of action or immunized a particular class of defendants. The statutes in issue here explicitly confer a cause

of action upon victims of medical malpractice, and open the courts to them for recovery of their damages. This Court's decisions therefore require that the innocent child in this case be treated evenhandedly with all other medical malpractice victims in Florida. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Bounds v. Smith*, 430 U.S. 817 (1977).

Neither is this a case like the ones on which the defendant will no doubt rely in response, in which a legislature has singled out medical malpractice victims for disparate treatment from victims of various other types of tortious conduct. The statutes in issue here are quite different. They discriminate *between* medical malpractice victims, and against a very small number of them. They create a class which is narrowed in two successive steps – the first by the legislature, the second by admittedly negligent defendants – to a very small class, in which only the most deserving plaintiffs are deprived for the benefit of the least deserving defendants.

First, the statutes themselves discriminate solely against those victims of medical malpractice who suffer the most severe injuries, and who therefore suffer the greatest intangible damages. It might have been another matter if the legislature had asked *all* medical malpractice victims to contribute to a supposed greater good. But these statutes ask no sacrifice of those victims whose victimizers opt for their day in court. And these statutes ask no sacrifice of those victims who suffer intangible damages in the arbitrary amount of $350,000.00 or less, even where their victimizers choose to admit liability. Such plaintiffs may reject the defendant's admission of

liability and demand for arbitration, and proceed to trial for the full amount of their intangible damages. Only those who have suffered greater losses are subject to the statutory "caps." Worse still, because the extent of the deprivation increases as the losses increase, the *most* seriously injured victims are the most seriously deprived by the statutory "caps" – and the greater the damages, the larger the deprivation.

Second, the class defined by the statutes themselves is only a potential class, subject to further definition – not by the legislature, but by a delegation of the legislature's lawmaking authority to medical defendants. The delegation occurs in the statutory option granted to medical defendants charged with negligence to select from their victims those who will be included in the class and those who will be excluded from the class. When a defendant charged with negligence chooses to contest the charge in a court of law, the plaintiff is excluded from the class. When a defendant charged with negligence chooses to admit the charge rather than contest it, the plaintiff is then included in the class affected by the "caps."

And because an admission of liability will rarely occur unless the defendant's conduct was so obviously negligent that it would be difficult to defend in a court of law, the class which is ultimately created by this two-step process includes only the most deserving plaintiffs who have been victimized by the least deserving defendants. Worse still, the "caps" which are imposed when a victim demands his right to a jury trial after the admittedly negligent defendant has selected him for inclusion in the class is not imposed for any purpose actually related to the public good. According to the plain languge of

§ 766.209(4)(a), the "caps" are deemed "warranted by the claimant's refusal to accept arbitration . . . ," and they are therefore simply a punishment for the plaintiff's exercise of his constitutional right to a jury trial, which is also explicitly recognized by § 766.209(1).

In short, the classification created by the statutes in issue here applies only to the most egregiously injured victims of negligent conduct which is itself so egregious as to be indefensible in a court of law, at the delegated election of the admittedly negligent defendant and as a punishment for exercising a constitutional right. The statutes affect *only* those persons – and no one else. It is almost as if, to shave a few percentage points off liability insurance premiums, the legislature had imposed damage "caps" on all illegitimate children, or on all blonde women, or on all left-handed or red-haired malpractice victims – but not quite. The statutes in issue here are worse; they allow the most obviously negligent defendants to single out the most seriously injured victims of their malpractice for special deprivation – and the greater the losses, the harsher the punishment.

In our judgment, this classification is so obviously and invidiously upside-down as to be arbitrary and irrational in the extreme – and unless the equal protection guarantee of the Fourteenth Amendment is to be declared essentially meaningless, the statutes in issue here simply must be declared constitutionally impermissible. *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (state violates equal protection clause by denying to illegitimate children wrongful death recovery available to legitimate children); *Levy v. Louisiana*, 391 U.S. 68 (1968)

(state violates equal protection clause by denying to illegitimate children workers' compensation benefits available to legitimate children); *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) (state violates equal protection clause by denying to mother of illegitimate child wrongful death recovery available to parent of legitimate child); *Mills v. Habluetzel*, 456 U.S. 91 (1982) (state violates equal protection clause by discriminating against illegitimate children in actions to obtain paternal support with considerably shorter statute of limitations than period imposed on legitimate children).

Most respectfully, if a state cannot withhold damage recoveries available to others simply because a child is illegitimate, we fail to see how Florida can permissibly withhold a full damage recovery available to others simply because a child is more seriously injured than most, and because her victimizer was so obviously negligent that it finds it prudent to concede its liability rather than face a jury of its peers. A statutory classification which rewards an admitted wrongdoer at the expense of its innocent, seriously maimed victim in this fashion simply cannot qualify as rational or reasonably based – and it remains for this Court to say so, else the Fourteenth Amendment remain essentially meaningless in Florida.

It is also noteworthy that several state courts of last resort have declared similar "caps" upon medical malpractice (and other tort) victims' recoveries to be both arbitrary and irrational, because they single out only the most seriously injured victims for deprivation, and have held such statutes violative of the constitutional guarantee of equal protection under the Fourteenth Amendment and parallel state equal protection guarantees. *See, e.g.*,

Arneson v. Olsen, 270 N.W.2d 125 (N. Dak. 1978); *Carson v. Mauer*, 120 N.H. 925, 424 A.2d 825 (1980); *Brannigan v. Usitalo*, 134 N.H. 50, 587 A.2d 1232 (1991); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989); *Richardson v. Carnegie Library Restaurant, Inc.*, 107 N.M. 68, 763 P.2d 1153 (1988).

Other courts, as the defendant will point out in response, have disagreed – at least in cases involving straight damage "caps," without the further discrimination presented by the statutes in issue here, which grant negligent defendants the unilateral right to select from their more seriously injured victims those who will be victims of the "caps." All that such a response will demonstrate, however, is that the lower courts are badly divided on the reach of the equal protection guarantee in the context presented here – which should be reason enough for this Court to settle the existing controversy by granting certiorari in the instant case. We respectfully urge the Court to do so.

3. The statutory scheme in issue here plainly violates the substantive and procedural due process guarantees of the Fourteenth Amendment, and the Florida Supreme Court's determination of this federal question conflicts with the decisions of other state courts of last resort.

In the context presented here, the test for determining a substantive due process challenge is essentially the same as the test governing an equal protection challenge. *See United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973). And because we have already demonstrated the

arbitrariness and irrationality of the statutes in issue here, we will not parse the statutes again. We point out simply that damage "caps," because they are simply fixed numbers imposed as a ceiling without regard to the actual damages involved, are wholly "arbitrary" lines drawn between recovery and non-recovery – lines which are no lines at all where minor injuries are concerned, but which become harsher and harsher as the severity of the injuries increases.

And the statutes in issue here are, of course, not merely "caps." Instead, the "caps" which they impose apply only to the most egregiously injured victims of negligent conduct which is itself so egregious as to be indefensible in a court of law, at the sole election of the wrongdoer, and the "caps" which apply in the instant case are explicitly defined as a punishment for exercising a constitutional right to trial by jury. Most respectfully, if simple "caps" are by their nature wholly "arbitrary," then the Rube Goldberg mechanism by which "caps" are imposed by the statutes in issue here, at the unilateral option of negligent defendants, are much worse than merely "arbitrary."

In any event, even if some wholly arbitrary line-drawing were permissible in an effort to meet legitimate governmental objectives, we do not believe that the arbitrary lines drawn by the statutes in issue here bear any reasonable relationship to the stated objectives of the legislation. Our point has been nicely made by the Texas Supreme Court as follows:

> In the context of persons catastrophically injured by medical negligence, we believe it is

> unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease . . . . [W]e hold it is unreasonable and arbitrary for the legislature to conclude that arbitrary damages caps, applicable to all claimants no matter how seriously injured, will help assure a rational relationship between actual damages and amounts awarded.
>
> Even the Keeton Commission [Texas Medical Professional Liability Study Commission] could not conclude that there was any correlation between a damage cap and the stated legislative purpose of improved health care, stating that adequate data was lacking. . . . One independent study has concluded that there is no relationship between a damage cap and increases in insurance rates [thereby reducing available health care], given that less than .6% of all claims brought are for over $100,000. Sumner, *The Dollars and Cents of Hospital Malpractice Insurance*, 9 (Aft Books 1979).

Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988).[5]

It is for this reason that some state courts of last resort have held straight damage "caps" upon medical malpractice victims' recoveries to be violative of substantive due process guarantees as well. *See Morris v. Savoy*,

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[5] Similarly, the Academic Task Force which recommended the statutory scheme in issue here to the Florida legislature based its projection of a 2.4% to 11% reduction in loss payments on "hypothetical assumptions (rather than empirical data)," and expressly cautioned that its analysis "should not be misinterpreted as vouching for the amount of savings that might be realized from caps on non-economic damages" (App. p. 53).

61 Ohio St.3d 684, 576 N.E.2d 765, 771 (1991) ("[I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice."); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989) (similar). *See also Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988); *Wright v. Central DuPage Hospital*, 63 Ill.2d 313, 347 N.E.2d 736 (1976).[6] These conflicts also deserve this Court's attention.

Finally, in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), this Court held that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." The statutes in issue here preserve a medical malpractice victim's claim of right and duty, but they clearly deny a meaningful opportunity to be heard within the judicial system to a very small set of the most deserving victims of the least deserving defendants. Moreover, the denial which occurs is not imposed by the law itself,

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[6] Other state courts of last resort have overturned various statutory "caps" on damages like those in issue here under constitutional provisions guaranteeing a right of access to the courts – a right which is inherent in the Fourteenth Amendment's due process guarantee. *See Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988); *Boswell v. Phoenix Newspapers, Inc.*, 154 Ariz. 9, 730 P.2d 186 (1986), *cert. denied*, 481 U.S. 1029 (1987). Other state courts of last resort have overturned legislative damage "caps" as a violation of the constitutional right to trial by jury. *See Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 771 P.2d 711 (1989); *Kansas Malpractice Victims Coalition v. Bell, supra*.

but by a delegation of the state's lawmaking power to the wrongdoer, which is given the purely procedural option of electing whether its victim will recover the full measure of his or her actual losses, or something considerably less.

Most respectfully, the defendant cannot possibly show a "countervailing state interest of overriding significance" which would justify the harsh and arbitrary deprivation imposed upon the innocent child whose arm was amputated as a result of its malpractice in this case, simply because it chose to admit its negligence rather than face a jury of its peers. We therefore respectfully submit that the statutes in issue here also violate the procedural due process guarantee of the Fourteenth Amendment.

CONCLUSION

For all of these reasons, it is respectfully urged that a writ of certiorari should issue to review the decision and judgment of the Supreme Court of Florida.

Respectfully submitted,

JOEL D. EATON, ESQ.
(Counsel of Record)
JOEL S. PERWIN, ESQ.

PODHURST, ORSECK,
JOSEFSBERG, EATON,
MEADOW, OLIN &
PERWIN, P.A.
25 West Flagler Street,
Suite 800
Miami, Fla. 33130
(305) 358-2800

Attorneys for Petitioners

GROSSMAN & ROTH, P.A.
Grand Bay Plaza, PH-1
2665 South Bayshore Drive
Miami, Fla. 33133